



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**Mike Stafford**  
**Harris County Attorney**

2007 JUL 23 AM 10:28

July 20, 2007  
CHIEF CLERKS OFFICE

Ms. LaDonna Castañuela  
Office of Chief Clerk, MC-105  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087

Re: Application by Southern Crushed Concrete, Inc., to Change the Location of a Concrete Crushing Facility in Harris County; SOAH Docket No. 582-05-1040; TCEQ Docket No. 2004-0839-AIR

Dear Ms. Castañuela:

Enclosed please find an original and 11 copies of the **Harris County's Brief on the City of Houston Ordinance Relating to Concrete Crushing Sites** in the matter referenced above. Copies of this filing were provided to the mailing list by facsimile and first class mail. Enclosed Attachment A, which is SCC's Exhibit 14 is an over-sized survey and the exact copy is provided by mail to all on the mailing list.

If you have any questions or comments, please call me at 713-755-8284. Thank you for your time and consideration.

Sincerely,

MIKE STAFFORD  
Harris County Attorney

A handwritten signature in black ink, appearing to read "Snehal R. Patel".

Snehal R. Patel  
Attorney for Harris County

MAS/SRP/lan  
Enclosures

c: Mailing List

SOAH DOCKET NO. 582-05-1040  
TCEQ DOCKET NO. 2004-0839-AIR

2007 JUL 23 AM 10:28

APPLICATION BY SOUTHERN	§	BEFORE THE TEXAS COMMISSION
CRUSHED CONCRETE, INC., TO	§	CHIEF CLERKS OFFICE
CHANGE THE LOCATION OF A	§	ON
CONCRETE CRUSHING FACILITY IN	§	
HARRIS COUNTY	§	ENVIRONMENTAL QUALITY

**HARRIS COUNTY'S BRIEF ON THE CITY OF HOUSTON ORDINANCE RELATING  
TO CONCRETE CRUSHING SITES**

**COMES NOW**, Harris County, and as requested by TCEQ General Counsel Derek Seal, files its brief regarding the City of Houston Ordinance (Ordinance) referenced in Senator Ellis' correspondence dated June 18, 2007.

**CHANGED CIRCUMSTANCES SINCE TCEQ MEETINGS IN 2006**

There was much discussion by Chairman White and Commissioner Soward during the two TCEQ agendas when this matter was considered in 2006 regarding the community's broad opposition to the location of a facility and issues relating to land-use incompatibility.<sup>1</sup> On June 28, 2006, Commissioner Soward felt that "many times it would be more appropriate if it were truly a siting decision at the local level with the neighbors and the citizens of that local government participating in that decision but that's not the case with Houston."<sup>2</sup> Chairman White also agreed about decisions made "at the state level rather than much closer to those impacted by the results of that decision."<sup>3</sup> Chairman White explains that this happens in many cases and "this is one that's unfortunate."<sup>4</sup> This matter was continued to August 9, 2006, where again Commissioner Soward stated that, "the City of Houston should be determining what it allows to go into community areas" but that "Houston, historically, has chosen not to do that."<sup>5</sup>

<sup>1</sup>June 28, 2006 and Aug. 9, 2006 TCEQ Agendas. As published and publicly available at <http://www.texasadmin.com/cgi-bin/tnrcc.cgi>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The two commissioners reached an impasse and the matter was left pending until the appointment of a third commissioner.

Since that time, much has happened. The new federal PM<sub>2.5</sub> National Ambient Air Quality Standards (NAAQS) were finalized and are effective as of December 17, 2006;<sup>6</sup> and when applied to this case, based on Southern Crushed Concrete Inc.'s (SCC's) own expert witness testimony, show that emissions from SCC's proposed facility will not meet the PM<sub>2.5</sub> federal standards.<sup>7</sup> This satisfies Chairman White's concerns from the June 28, 2006 meeting that she did not "think [she] can make a decision on the basis of a proposed standard that may be better and more protective when it is not the adopted federal standard . . . ."<sup>8</sup> Similarly, the City of Houston under its general police powers has chosen to promulgate a land use ordinance that regulates the locations of concrete crushing facilities.<sup>9</sup> The Ordinance, unanimously passed and approved by the City of Houston Council, satisfies the Commissioners' concerns with the need for land use decisions such as these to be made the local level.<sup>10</sup>

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<sup>6</sup> 71 Fed. Reg. 61144 (Oct. 17, 2006). Published and publicly available at: <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-8477.pdf>. See 30 Tex. Admin. Code § 101.21

<sup>7</sup> HC-Ex. 30 and 31. SCC's own predicted 24-hour PM<sub>2.5</sub> emissions of both 36.1 µg/m<sup>3</sup> and 44.1 µg/m<sup>3</sup> exceed the new 24-hour PM<sub>2.5</sub> emissions NAAQS of 35 µg/m<sup>3</sup>. Tr. at 583-585. See Tr. at 225, lines 2-6. The ALJ also acknowledged both modeling calculations in his Proposal for Decision and at the June 28, 2006 TCEQ agenda. ALJ's Proposal for Decision, Footnote 41, at 23; June 28, 2006 Agenda.

<sup>8</sup> June 28, 2006 TCEQ Agenda. There is a pending motion to re-open the record filed by Harris County, City of Houston and TPSC on the account of these changed circumstances. This is even more crucial because the PFD does not consider this changed circumstance. The ALJ was at liberty to take judicial notice as he did with the repealed total suspended particulate rules but failed to do so here. At the June 28, 2006 hearing, the ALJ stated the following: "To be honest with you, I don't know what the two [federal] proposals are, because they came out after the [proposal for decision] and I know the EPA has issued some. Ultimately, they weren't part of the record, and I didn't want to be tainted by them, so I don't know where the standards are now. I was dealing with what the evidence and what the proposals were before me at the time of the hearing." June 28, 2006 TCEQ agenda.

<sup>9</sup> City of Houston, Texas, Ordinance No. 2007-545, effective Oct. 1, 2007. As published and publicly available at <http://www.houstontx.gov/environment/pdf/ordinance-concretecrushing.pdf>

<sup>10</sup> The City chose to adopt a land use ordinance but even if it had adopted a similar ordinance for the control and abatement of air pollution, the City would not be precluded from doing so. A city ordinance that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute; however, a state statute and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. *City of Freeport v. Vandergriff*, 26 S.W.3d 680, 681 (Tex.App.-Corpus Christi 2000, pet. denied); *City of Houston v. Todd*, 41 S.W.3d 289, 295 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2001); *Dallas Merchant's and Concessionaire's Assoc. v. City of Dallas*, 852 S.W.2d 489, 490-491 (Tex. 1993). In order for a state statute, to preempt a subject matter usually encompassed by municipal authority, the state statute must do so with "unmistakable clarity." *Dallas Merchant's and Concessionaire's Assoc.*, 852 S.W.2d at 491. In this case, the Tex. Health and Safety Code § 382.113 merely requires the municipal ordinances not to be "inconsistent." There is no language that gives exclusive authority to the TCEQ only. The minimum 440 yards or 1320 feet distance requirement for concrete crushing facilities set out in Tex. Health and Safety Code § 382.065 is from the point on the stationary source closest to residence, school or place of worship. Tex. Health & Safety Code. § 382.065. The 1500 feet distance requirement measuring from the property-line of the site in the City Ordinance would merely serve to broaden the applicability of that provision, and in no way could be argued as being inconsistent.

Akin to zoning, the Ordinance's purpose is to prevent the concentration of concrete crushing sites<sup>11</sup> because "these sites reasonably are expected to have a negative effect on residential property values and can affect other forms of land use such as public parks, schools, child care facilities, hospitals, nursing homes and places of worship . . . ."<sup>12</sup> This type of ordinance is not unprecedented and is similar to other City of Houston land use ordinances regulating the location of correctional facilities, hotels, hazardous enterprises, and sexually oriented businesses.<sup>13</sup>

Under the Ordinance, a new concrete crushing operation without a TCEQ permit issued before May 9, 2007, will not be allowed to operate if it is within a 1,500 foot radius from the property line of the tract (contiguous parcel of property under common ownership) to a child care facility, public park, school, hospital, nursing home place of worship or other concrete crushing operations.<sup>14</sup> Based on the record, it is clear that even without any further submittals or analyses, this prohibition will apply to SCC because in evidence presented by SCC expert witness surveyor Cesar Romero during the hearing, the Ethel Mosely Elementary School is within 1500 feet of the property line using the scale available on the exhibit.<sup>15</sup> As such, under the Ordinance and due to land use incompatibility, it is highly unlikely that SCC will be able to relocate its crusher to the 2350 Belfort Avenue location.

### **CONCLUSION**

In light of the revised PM<sub>2.5</sub> standards and evidence on the record, the proposed concrete crushing facility is not viable at the proposed location from the regulatory standpoint of the TCEQ; nor will it be able to operate at this location under the Ordinance. Harris County stands firm in its conviction that SCC's application to change the location of its concrete crushing

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<sup>11</sup> Chairman White had stated that [she] "truly believe[s] that we don't have the authority to base decisions on cumulative effects which end[s] up saying the next one that comes along is too many," but under police powers and to protect citizens' quality of life in terms of issues such as traffic, noise, property values, the City can step in under its authority. Aug. 9, 2006 TCEQ agenda. That is precisely what the City of Houston has chosen to do here.

<sup>12</sup> City of Houston, Texas, Ordinance No. 2007-545

<sup>13</sup> Houston, Tex., Code §§ 28-121-136; Houston, Tex., Code §§ 28-221-246

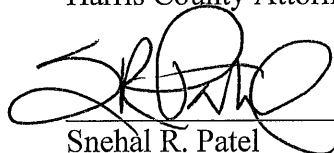
<sup>14</sup> City of Houston, Texas, Ordinance No. 2007-545

<sup>15</sup> Attachment A – SCC's Exhibit No. 14 – a true and correct copy of the survey of the proposed site at 2350 Bellfort Avenue, as certified by Mr. Cesar Romero showing certain landmarks and showing measurements from the perimeter of the proposed crusher site to certain points including Ethel Mosely Elementary School marked as No. 3. See SCC prefiled testimony of Mr. Romero at pp. 3 – 4 (A-Ex. 30). Using the graphic scale provided on the survey at the top left of the map (1 inch = 400 feet which is what Mr. Romero uses in calculating distances), and measuring

facility must be denied based on adverse health impacts to its citizens from particulate matter emissions from the proposed facility. In the alternative, under the Commission's authority on actions it can take on an application as provided in 30 Tex. Admin. Code § 50.117(a) including "dismiss proceedings" or "take any other appropriate action,"<sup>16</sup> Harris County requests that the TCEQ dismiss the proceedings, and echoing Chairman White's and Commissioner Soward's comments on the appropriateness of siting decisions to be made at the local level, let the local governmental entity with jurisdiction balance the interests of its community, and under its Ordinance, using various location criteria, determine where concrete crushing facilities should locate.

Respectfully submitted,

MIKE STAFFORD  
Harris County Attorney



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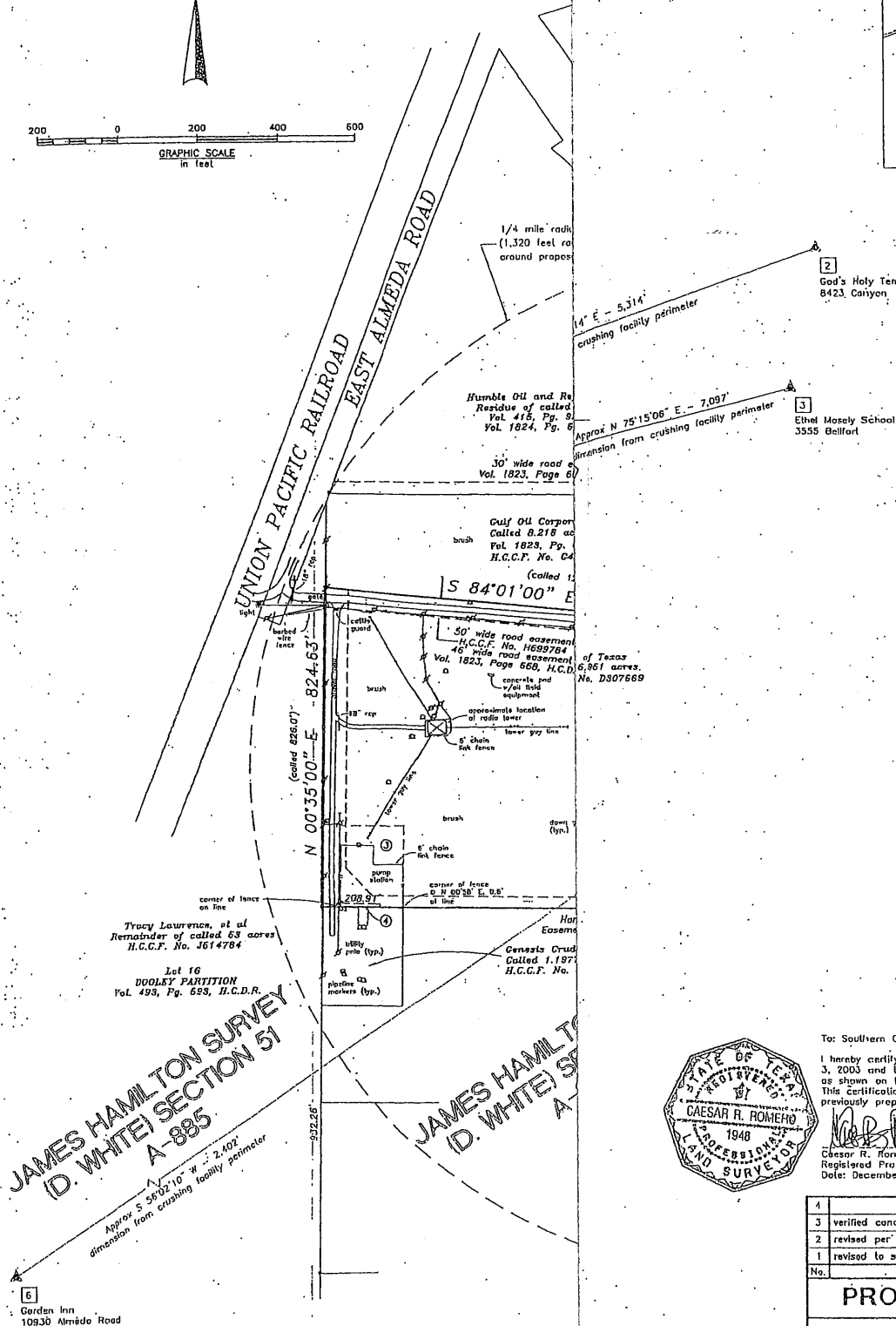
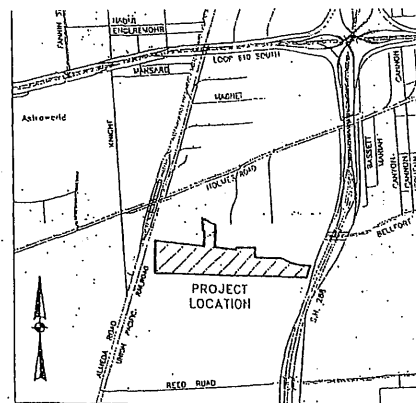
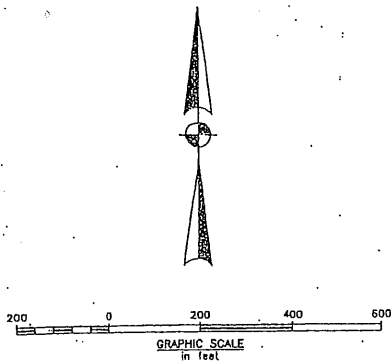
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from the property line of SCC identified as "Point of Beginning" to No. 3 - Ethel Mosely Elementary School, shows that the elementary school is within the 1500 feet. A-Ex. 14.

<sup>16</sup> Section 50.117(a) states: "[t]he commission may grant or deny an application in whole or in part, suspend the authority to conduct an activity or dispose of waste for a specified period of time, *dismiss proceedings*, amend or modify a permit or order, *or take any other appropriate action.*" 30 Tex. Admin. Code § 50.117(a) (emphasis added).

**Harris County**

**Attachment A**



#### SURVEYOR'S CERTIFICATION

To: Southern Crushed Concrete:

I hereby certify that this Exhibit drawing was field verified on December 3, 2003 and that all conditions that were previously shown are the same as shown on the previously submitted Exhibit drawing of July 11, 2003. This certification is not for a boundary survey and only applies to the previously prepared Exhibit Map.

Caesar R. Romero  
Registered Professional Land Surveyor No. 1245  
Date: December 3, 2003



No.	Revisions	Date
4		
3	verified conditions and revised certification	12/03/03
2	revised per Jim Miller	07/11/03
1	revised to show latitude/longitude	08/18/03

#### PROPOSED CRUSHER SITE

58.193 ACRES OF LAND OUT OF JAMES  
HAMILTON (D. WHITE) SURVEY, A-885  
CITY OF HOUSTON, HARRIS COUNTY, TEXAS



**CLARK-GEOGRAM INC.**  
LAND SURVEYORS

Dallas - Houston - San Antonio  
1315 Sherwood Forest Drive - Houston, Texas 77043  
Tel. 713.481.1400 - fax 713.481.3639

Dwg. date: 03/31/00	Scale: 1"=200'	File: 4773 REVISED SITE
Drawn by: AG/TCP	Calc. by: TCP	Chk. by: BT
Client: SOUTHERN CRUSHED CONCRETE	Job no.: 99-12-4773/007	

CERTIFICATE OF SERVICE  
SOAH DOCKET NO. 582-05-1040  
TCEQ Docket No. 2004-0839-AIR

I, Snehal R. Patel, do hereby certify that on July 20, 2007, true and correct copies of the foregoing "Harris County's Brief on the City of Houston Ordinance Relating to Concrete Crushing Sites" in the above-docketed proceeding were sent via facsimile and First Class Mail to the persons listed on the attached mailing list.

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